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1 A. Well, a 'brand' is one of the words you can
2 use interchangeably with company or source.
3 Q. Okay. And you also know as an expert in this
4 field who has testified many, many times in trade bar
5 cases, that in order to have a protectable trademark or
6 trade dress, the people in the market, the consumers
7 who purchase those products, don't have to know the
8 name of a company that puts it out, they just have to
9 know that it's a brand, it's a single source; correct?
10 A. When you're dealing with secondary meaning,
11 yes.
12 Q. Okay. And when you're dealing with confusion
13 if they think it comes from the same brand, they are
14 confused; right?
15 A. If it comes from the same source, yes.
16 Q. Or the same brand?
17 A. If they the same brand, yes.
18 Q. Okay. So it would have been useful to find
19 out in your survey whether people recognized the brand
20 of the product that you're showing them, whether it be
21 SAME or SUGAR TWIN; right?
22 A. I'm not sure what the question is.
23 Q. Well, the purpose of your Question 1, one of
24 the purposes -- I've just highlighted the words that go
25 to this idea. But there is nothing wrong with asking

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1 right?
2 A. No.
3 Q. In fact, I believe on your direct testimony
4 you used the word "admonishment." And what you meant
5 by that is you admonish the people before you ask them
6 Question 1, 'If you don't know the answer, it's okay to
7 say so. Please do not guess.' Is that what you did in
8 your survey?
9 A. That's what I did in my survey, yes.
10 Q. When McCarthy and Ever Ready tell us what you
11 ought to ask is 'Who do you think puts out this
12 product.' Right?
13 A. McCarthy was talking about --
14 Q. Yes or no, sir.
15 A. -- what was done in an Ever Ready test.
16 MR. ZALESIN: May I have an answer, Your
17 Honor?
18 A. I did not see in McCarthy --
19 MR. ZALESIN: Your Honor?
20 A. -- in what you showed me the notion that --
21 THE COURT: You have to answer yes or no.
22 THE WITNESS: That's not the question.
23 Ask me the question again, then.
24 MR. ZALEZIN: I'll withdraw the question.
25 BY MR. ZALEZIN: .

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1 them 'Do you know what brand puts out the sugar
2 substitute that I showed you, is there?
3 A. You could ask them that in addition.
4 Q. Okay. You could break it up into pieces, like
5 Professor Mazis was talking about; correct?
6 A. I don't know if you could break it up into
7 pieces. The problem with what you're doing is you're
8 funneling or focusing people on only one element, which
9 would be brand.
10 If they answer that, then they are committed
11 to that answer. And it influences the rest of their
12 answers.
13 So generally speaking, you don't funnel people
14 in a survey when you design it like this.
15 Q. With respect, Mr. Johnson, the problem is that
16 you're telling people, 'Only tell me if know. Please
17 don't guess,' and then asking them if they know the
18 name of the company that puts out the product. And
19 your question is so long and convoluted that they lose
20 to word "brand." Isn't that right, sir?
21 A. No.
22 Q. Isn't that the reason why 88 percent of the
23 consumers showed SAME, the most famous sugar substitute
24 trademark in all of Puerto Rico, when you take it away,
25 two seconds later, they can't identify it? Isn't that

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1 Q. Let's talk about your choice of a control in
2 your survey. You said one of the reasons why you put
3 -- first of all, I wrote down a number of things that
4 you said, and the record will reflect what it reflects.
5 But first of all, let me just ask you whether you would
6 agree that the reason for a control is to measure error
7 or noise or guessing in a survey; is that correct?
8 A. That's what a control generally does, yes.
9 Q. Okay. And you said you picked SUGAR TWIN
10 because you thought it was a pretty good control;
11 right?
12 A. I think SUGAR TWIN is an control.
13 Q. And one of the reasons you thought it was a
14 good control is because it's not well known in the
15 Puerto Rico market; right?
16 A. That's correct.
17 Q. If a brand or a product is well known in the
18 market, then people are going to respond based on what
19 they know about that brand or think about that brand,
20 as opposed to just being shown the stimulus; correct?
21 A. Well, it dilutes its value. In other words,
22 it's going to have less effect. It will be a slightly
23 less effective control.
24 Q. Now, you also said -- well, just to close the
25 loop on that. So you would agree, then, that the vast

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1 majority of consumers in Puerto Rico are not familiar
2 with the SUGAR TWIN brand. That's one of the criteria
3 you used to select it as a control; correct?

4 A. What I'm saying is that to the extent that
5 this is a wildly popular brand and you would have to
6 worry about brand share mentions, it's not likely to be
7 as large a factor for this product as other products
8 you could find in the marketplace here.

9 So you're picking a product that's in the
10 marketplace, but it's not the market leader.

11 Q. Not only is it not the market leader, the 12
12 boxes that you bought for your survey has probably
13 doubled their said sales in the month of February;
14 right? You know that they have less than one-tenth of
15 a 1 percent of the market in Puerto Rico.

16 A. I heard that testimony, yes.

17 Q. And you're not here to disagree with that;
18 right?

19 A. No, I'm not.

20 Q. Now, I think you said also that when you're
21 selecting a control for a survey, that you want to get
22 as close as possible to the trade dress that's sought
23 to be protected without choosing a trade dress that's
24 infringing. Is that your testimony?

25 A. I think to that effect, yes.

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1 shares as many characteristics with the experimental
2 stimulus as possible with the key exception of the
3 characteristics whose influence is being assessed."

4 Q. So the characteristics whose influence is
5 being assessed, that would be the shared elements of
6 the trade dress, like the color yellow and the pictures
7 on the box; right?

8 A. No.

9 Q. Isn't it a fact, sir, that what this article
10 is talking about is it's got to have a different name,
11 maybe the same orientation. But like it says here, the
12 control should not share with the experimental stimulus
13 the feature whose impact is being assessed, because if
14 it does, you're going to get pretty much the same
15 responses to both stimuli. Right? It doesn't take a
16 genius to figure that out. Isn't that right?

17 A. In the paragraph you just outlined, if you
18 look in the middle of that, it's, "if for example the
19 control stimulus in the case of alleged trademark
20 infringement is itself a likely source of consumer
21 confusion."

22 We are talking about the infringing elements,
23 as I understand this.

24 Q. Are you here to testify that there is no
25 likely or possible confusion between SUGAR TWIN and

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1 Q. Are you familiar with any case law or treatise
2 that says you want to get as close as possible without
3 stepping over the line when you're choosing your
4 control?

5 A. The Manual on Litigation. The federal manual
6 says that.

7 Q. Do you have that up there?

8 A. No, I don't.

9 Q. Let me give you a copy, and why don't you go
10 ahead and find it for me.

11 MR. ZALESIN: May I have a copy of Plaintiff's
12 74?

13 (Book given to the witness.)

14 BY MR. ZALESIN:

15 Q. To you help you out, if you go to page 256,
16 that's the section on controls. Why don't you tell me
17 what in here you're relying on.

18 A. Page 258, the second paragraph, "In designing
19 your --

20 Q. Let me catch up with you. Hang on. Go ahead,
21 Mr. Johnson. Do you want to point me to the particular
22 paragraph?

23 A. Well, I just did.

24 "In designing a control group study the expert
25 should select a stimulus for the control group that

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1 SPLENDIA?

2 A. I am not here to determine whether or not
3 SUGAR TWIN infringes or does not infringe. The
4 testimony I heard yesterday says it not infringe.

5 What I am here is to tell you why I picked
6 SUGAR TWIN as a control, which is what I'm trying to
7 do.

8 Q. I'm talking about confusion. You're talking
9 about infringement, sir. Infringement is a matter of
10 law for the Court to determine.

11 Let's talk about confusion. Are you here to
12 testify that there is no possibility or no likelihood
13 of confusion in the Puerto Rico marketplace where
14 SPLENDIA is the market leader and SUGAR TWIN has a
15 one-tenth of 1 percent share, between the trade dress
16 of SUGAR TWIN and the trade dress of SPLENDIA? Are you
17 here to say that or not?

18 A. Well, I could talk about the amount of
19 confusion you measure in terms of SUGAR TWIN and
20 SPLENDIA in the market here in Puerto Rico, which is a
21 side result of the survey.

22 Q. Okay. And if we were to talk about that, what
23 we would find out is that about 20 percent of consumers
24 in your survey thought that SUGAR TWIN was the same
25 brand or came from the same company as SPLENDIA; right?

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1 A. Well, what it says is the noise level in the
 2 survey, in other words the amount of error of people
 3 saying incorrectly that SUGAR TWIN and SPLENDIA are
 4 related, is 20.6 percent.
 5 Q. Sir, if I showed you a box of EQUAL, and 20
 6 percent of your consumers said 'that comes from EQUAL
 7 or comes from Merisant,' that's not noise; that's what
 8 people are saying in response to the stimulus. Right?
 9 A. That's what you're measuring when you measure
 10 a control or a test cell.
 11 Q. Sure. So for example, if I took SPLENDIA and I
 12 changed it to 'Sprenda' instead, and I gave people that
 13 modified trade dress, kept everything else the same;
 14 and people came back and said in proportions, 'gee,
 15 that's SPLENDIA or that comes from the same company as
 16 SPLENDIA,' that's not noise. That's confusion. Right?
 17 A. It depends on how many people would say it
 18 compared to how many people would normally say of
 19 another product in genre.
 20 Q. Let's see if we can get to the bottom line
 21 here. You chose SUGAR TWIN as your quote/unquote
 22 control because it was the closest thing you could find
 23 to SPLENDIA. It's the only other no-calorie sweetener
 24 sold anywhere that uses a yellow and white with blue
 25 accent trade dress. And you're basing your testimony

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1 and high awareness; right?
 2 A. That's correct.
 3 Q. And so when people today, in 2004, in Puerto
 4 Rico are handed a box of SUGAR TWIN, if they say, 'gee,
 5 that makes me think of SPLENDIA,' or 'I think that comes
 6 from the same company that puts out SPLENDIA,' it's
 7 because they are mixing up SUGAR TWIN with SPLENDIA
 8 based on the similarity in the packaging. Right?
 9 A. Or they are mixing up SPLENDIA with SUGAR TWIN,
 10 depending on how you think about it.
 11 Q. Okay.
 12 A. That's the base level of noise or error of
 13 people in a survey situation when you go to measure it
 14 who confuse the two products, SUGAR TWIN and SPLENDIA.
 15 Q. And the conclusion that you testified to today
 16 that there is no likelihood or minimum likelihood of
 17 confusion between SAME and SPLENDIA, that conclusion is
 18 based upon the notion that the control you picked,
 19 SUGAR TWIN, sets, to use your words, a bench level or a
 20 bench mark in the marketplace which is an acceptable
 21 level of confusion. Correct?
 22 A. It's the baseline of existing confusion, yes.
 23 Q. Okay. So the fact that 20.6 percent of
 24 consumers today in 2004 in Puerto Rico might confuse
 25 SUGAR TWIN with SPLENDIA is the basis for your

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1 in this case on the fact that the level of confusion
 2 caused by Merisant's new SAME product is no worse than
 3 the level of confusion caused by SUGAR TWIN. Isn't
 4 that in essence what you're saying?
 5 A. Well, first of all, you're saying 'level of
 6 confusion.'
 7 Q. Uh-huh.
 8 A. If there is a level of confusion, it's caused
 9 by SPLENDIA, not SUGAR TWIN, first of all, in terms of
 10 SUGAR TWIN; because SUGAR TWIN is the senior user, as I
 11 understand it, of their trade dress.
 12 Q. Mr. Johnson, I know that you do a lot of
 13 litigation, but I would appreciate it if you could
 14 answer my questions and not give legal analysis to the
 15 Court. Okay?
 16 You know, as well as I, based on the facts,
 17 that SUGAR TWIN is a virtually non-existent product in
 18 the Puerto Rico market; correct?
 19 A. SUGAR TWIN has very low sales here.
 20 Q. And very low awareness. That's why you picked
 21 it as your control. That's what you said a minute ago.
 22 Right?
 23 A. Well, I know it has very low sales. I never
 24 measured its awareness.
 25 Q. Okay. In contrast, SPLENDIA has a lot of sales

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1 conclusion that it's okay for SAME to confuse 25
 2 percent of consumers; correct?
 3 A. That's not what I said. What I said is that
 4 the statistics -- and, again, we'll have to go back to
 5 the facts that these estimates are based on a survey,
 6 and the survey has an error rated, and we are measuring
 7 the error in the test cell and the error in the control
 8 cell, and then you subtract the two.
 9 The only number you can be certain of is the
 10 difference between a baseline number, which you know
 11 includes the number of people who guess, the number of
 12 people who answer SPLENDIA for other reasons when they
 13 are given a package of sweetener that's available in
 14 the marketplace, and the same group for SAME.
 15 So what I know is this 4.3 percent is the
 16 confusion rate.
 17 Q. Confusion rate.
 18 A. That's correct.
 19 Q. You testified a minute ago that this 20.6
 20 percent is an error rate?
 21 A. It is.
 22 Q. By error rate you mean a confusion rate?
 23 A. It is the number of the people in the survey
 24 situation when sold a product who say that it has some
 25 relationship to SPLENDIA. So they are in error.

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1 Q. And it's not an error rate, like you show
2 people a red and white box that has no similarity at
3 all to SPLEND in lieu of the brand name, and they yes,
4 'Yep, that's SPLEND.' That's an error. Right?

5 A. That's guessing. That's what we call
6 "random."

7 Q. And that isn't what you're measuring. What
8 you're measuring is the likely confusion rate between
9 SUGAR TWIN, which comes in a yellow and white trade
10 dress, and SPLEND, when the products are presented in
11 the way they were presented in your survey; correct?

12 A. No. The likely error rate.

13 Q. I want to ask you about one of the other
14 conclusions in your report. Your report says that it's
15 your opinion -- I'm in paragraph 15 -- it's your
16 opinion that "the color serves to some extent as a
17 functional attribute suggesting membership in the
18 product genre of sugar substitutes but does not have
19 any trademark significance such as secondary meaning
20 when used for these products."

21 That's your opinion, sir?

22 A. Yes, it is.

23 Q. So it's functional as suggesting membership in
24 the genre of sugar substitutes. That's essentially
25 what you're saying?

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1 Q. I see. And, again, as somebody who spends a
2 lot of time working on legal cases, I take it you're
3 familiar with the doctrine of functionality in
4 trademark law; correct?

5 A. I am.

6 Q. And you know that the United States Supreme
7 Court has spoken on that a number of times; right?

8 A. Yes.

9 Q. And I'm just going to show you an excerpt from
10 the 1st Circuit case called "I. P. Lund Trading against
11 Kohler, from 1998. Do you know that case?

12 A. I read a number of decisions regarding that.
13 I believe it was a couple of decision.

14 Q. What I want to get at here, and I'm not really
15 here to examine your legal expertise. What I want to
16 examine with you is whether your survey measures what
17 the United States Supreme Court says is the test of
18 functionality. Okay?

19 So I'm going to start from the functionality
20 and legal standards, on page 37 of this case, which is
21 163 F3d, 27, is the cite. The 1st Circuit tells us
22 that the core inquiry into whether trade dress is
23 functional requires examination of the effects that
24 granting protection to a product will have on the
25 ability of others to compete.

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1 A. Yes.

2 Q. So NUTRASWEET, which has no yellow, has
3 managed to compete without that functional attribute.
4 Is that right?

5 A. Clarke manages to compete without it, yes.

6 Q. SWEET'N LOW, which has no yellow, has managed
7 to compete just fine without that functional attribute.
8 Is that right?

9 A. That's correct.

10 Q. EQUAL has no yellow and manages to compete and
11 has for over 20 years without that functional
12 attribute. Do you agree with that?

13 A. Yes.

14 Q. And the blue SAME product which Merisant,
15 their predecessor, has sold in Puerto Rico for ten
16 years, that also has managed to compete quite nicely
17 without the what you call "functional attribute," the
18 yellow color. Right?

19 A. Yes. I don't know how "nicely" it is.

20 Q. Well, it's the market leader based on volume.
21 That's not bad. Right?

22 A. Well, it might do better if it were yellow.

23 Q. Maybe that's why they changed their or came
24 out with the yellow package.

25 A. Maybe it is.

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1 Did your survey examine that, sir?

2 A. No, I don't believe it does.

3 Q. Continuing on. Thus, in Inwood Laboratories
4 versus Ives Laboratories, from the United States
5 Supreme Court in 1982, the Court stated that a
6 functional feature is one that is essential to the use
7 or purpose of the article or that affects the cost or
8 quality of the article.

9 Did your survey measure that, sir?

10 A. No, it does not.

11 Q. And the fact that all these other sweeteners
12 we just went through, these no-calorie sweeteners, that
13 competed for decades without yellow packaging tends to
14 suggest that it's not essential, doesn't it?

15 A. That's not a survey result.

16 Q. But your survey didn't measure that, in any
17 event; right?

18 A. No, it does not.

19 Q. And the 1st Circuit goes on that in
20 Qualitex -- which do you know that Qualitex is another
21 recent Supreme Court case?

22 A. Yes.

23 Q. Relatively recent. In the late 90's or so.

24 In Qualitex the Court added that an inquiry
25 into functionality turns in part on whether granting

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1 protection to a mark, quote, would permit one
2 competitor to interfere with legitimate
3 non-trademark-related competition through actual or
4 potential exclusive use of an important product
5 ingredient.

6 Does your survey measure that, Mr. Johnson?

7 A. No, it does not.

8 Q. So your survey doesn't measure in any way
9 whether the color yellow is functional in the
10 no-calorie sweetener market, does it?

11 A. It doesn't measure it, no.

12 Q. And the opinion that you expressed is based on
13 no research; correct?

14 A. No, it's based on the results of the study
15 that talked about the attribution of color to a number
16 of different brands.

17 What it says is that if I make a decision on
18 source based on color, and we saw it earlier in the
19 surveys that color, and in this case yellow, is used to
20 tell consumers a lot of different brands from a lot of
21 different manufacturers, which means it's not exclusive
22 to one.

23 Q. What does your survey tell you about the use
24 of yellow to identify a lot of brands from a lot of
25 manufacturers?

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1 yellow is when they said in response to the question
2 'Why is it that you think this product is associated
3 with SPLEND?' Then and only then in your survey did
4 they say 'because it comes in a yellow box.' Right?

5 A. Well, other people said other brands. They
6 associated it with those brands, because they came in a
7 yellow box.

8 Q. Like Lipton Tea?

9 A. Like Lipton Tea.

10 Q. I'm talking about no-calories sweeteners, sir.

11 Few people mentioned Lipton Tea having a
12 similar color scheme to SUGAR TWIN. Right? That's
13 what you were just referring to?

14 A. Yes.

15 Q. In the SAME cell the group of people who saw
16 SAME, when people mentioned the color as the reason,
17 what they said is not Lipton Tea, they said, 'that's
18 the color of SPLEND.' Right?

19 A. For the most part, yes.

20 Q. I have a hypothesis to try out on you, Mr.
21 Johnson. I fear you will disagree, but let's give it a
22 shot.

23 Here is my hypothesis. Your survey doesn't
24 show that there is a low level of likely confusion
25 between SAME and SPLEND, after all, they look pretty

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1 A. When we asked people in the survey why they
2 said a particular product came from a particular
3 manufacturer, color was the most frequent mentioned.

4 Q. When you asked them why, they said that the
5 product being shown to them is associated with SPLEND,
6 they mentioned the color yellow; right? That's what
7 you're talking about?

8 A. Yes, as well as other products, for example,
9 Lipton Tea.

10 Q. But Lipton Tea isn't in the no-calorie
11 sweetener market, is it?

12 A. No. But it is yellow.

13 Q. And you understand that McNeill isn't claiming
14 ownership of the color yellow for all consumer
15 products. We are not trying to stop Prestone from
16 selling their antifreeze in a yellow jug. You
17 understand that. Right?

18 A. I understand.

19 Q. And when you showed them SAME, the hand full
20 of people who did remember the SAME brand name or knew
21 that it came from SAME, they didn't say 'that's SAME
22 because it comes a yellow box.' Did they?

23 A. I don't think there were a lot of mentions
24 about that.

25 Q. The only time anybody mentioned the color

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1 much alike. What your survey shows is that both of
2 those products that you tested, both SAME and SUGAR
3 TWIN, among some consumers in Puerto Rico is likely to
4 be confused with SPLEND.

5 Isn't that in fact what your survey shows?

6 A. No.

7 Q. Because you consider any mention of SPLEND in
8 response to SUGAR TWIN to be noise that has to be
9 filtered out; right.

10 A. This is a survey.

11 Q. Yes or no.

12 A. When you do a survey --

13 Q. Mr. Johnson, excuse me. You can say whatever
14 you want on redirect. The reason why you reject my
15 hypothesis is because you consider anyone who mentions
16 SPLEND as being associated with SUGAR TWIN after
17 looking at a SUGAR TWIN box, to be noise; correct?

18 A. Noise or error, yes.

19 Q. Just as few questions about Dr. Mazis's
20 survey, and then we can -- at least I'll stop.

21 I think you said that in the test stimulus
22 that they should have removed the swoosh.

23 Is that your testimony?

24 A. I said I was surprised to see it, because it's
25 part of the trademark, which is unusual.

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1 Q. It's also a part of the overall look of the
2 package, isn't it?

3 A. Well, so is trade name. If the trade mark is
4 SPLENDIA with the swoosh as part of the name, then
5 normally it wouldn't be on here.

6 Q. If you wanted to know whether the famous NIKE
7 swoosh has secondary meaning in the sneaker market, you
8 wouldn't give people a pair of sneakers and remove the
9 swoosh, would you?

10 A. No, you would test just the swoosh.

11 Q. And by the same token, in the case of SPLENDIA,
12 you also pointed out it's got the type face in the
13 graduated lettering that fades from light blue to dark
14 blue. You wouldn't want to make it a different color
15 lettering, would you?

16 A. Well, typically you do.

17 Q. Do you understand, Mr. Johnson, that the
18 graduated blue lettering, from light to dark, is one of
19 the elements of trade dress that McNeil is seeking to
20 protect in this case?

21 A. Yes, I do.

22 Q. So if you're doing a test of secondary meaning
23 of the trade dress to which protection is sought, it
24 would be pretty silly to remove one of the elements for
25 which protection is sought, wouldn't it?

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1 Rico market?

2 A. No, I don't.

3 Q. And the reason you say that primarily is
4 because of the discrepancy with these 37 interviews?

5 A. No.

6 Q. Does the 37 interviews have anything to do
7 with your assessment of the probative value of Dr.
8 Mazis's survey?

9 A. Well, it's not for me to judge whether or not
10 those are indicative of a larger problem.

11 If we set them aside and, for example, we
12 didn't consider the control at all, other than the fact
13 that we the considered the 37 in or out, is an enormous
14 error on guessing.

15 So you have to ask yourself 'What are we
16 testing given the way the survey was designed and
17 carried out?' Are we testing that people know that
18 SPLENDIA is yellow, or are we testing whether or not
19 there are trademark significance in this package that
20 tells people that this package only comes from a single
21 source, whether or not it's SPLENDIA or not.

22 Q. You know, Mr. Johnson, that in all of the
23 interviews that were filled out on white paper, there
24 were a grand total of four people who said that the
25 control stimulus is the package of SPLENDIA. Right?

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1 A. Usually when you do it, for example, if you're
2 going to test the Nike swoosh or you were going to test
3 the graduated look, you would test it monadically
4 with -- you would give someone a graduated look bar,
5 for example, and ask them whether that tells them
6 anything in terms of -- does it tell them anything, is
7 what you would ask them.

8 Usually you don't do it like this.

9 As I said earlier, it's very difficult to
10 design a package -- and I'm not a designer of this, and
11 this is always a disputed thing. But usually you
12 remove the trade name or the trademark from the product
13 when you test it.

14 Q. Is it your testimony that the trade name
15 wasn't removed?

16 A. Well, part of it was and part of it wasn't.

17 Q. It's your testimony that Dr. Mazis's survey is
18 worthless junk that no qualified expert would rely on.
19 Is that your testimony?

20 A. I don't remember saying that.

21 Q. Is that your opinion?

22 A. I didn't say that.

23 Q. Do you think Dr. Mazis's survey has any
24 probative value of whether SPLENDIA, the SPLENDIA trade
25 dress, has achieved secondary meaning in the Puerto

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1 A. There were four people out of -- I don't know
2 if it was 40 or 50 that were asked the question.

3 Q. Okay. But of the 100 interviews conducted on
4 the white paper, on the white box, there were four
5 people who said that this the trade dress of SPLENDIA.
6 Right?

7 A. Again, there were four out of however many
8 were asked. So maybe 50 people were asked. That's 4.
9 That's about 8 percent.

10 Q. However you percentage it, you understand
11 that, say we get rid of the 37 and we left the 63, you
12 have four out off 63 people. That's going to raise it
13 from 4 percent to 7 percent, or 7 percent to 11
14 percent, however you want to percentage it. It's
15 not -- no matter what you do with those 37 interviews,
16 it's not going to cause a high number of respondents to
17 be saying that this control stimulus is the trade dress
18 of SPLENDIA.

19 MR. LOCASCIO: Objection. It's the same that
20 Mr. Zalesin raised before, mixing up the denominator.
21 Only 45 of those 63 people were asked of what it was
22 associated with.

23 It mischaracterizes testimony and the
24 evidence.

25 BY MR. ZALESIN:

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1 Q. Can you answer my question, sir
 2 A. I believe that what we are all saying sort of
 3 is that there is some unknown number. But it's
 4 probably, let's say, between 4 and 12 percent of people
 5 who have never seen that box before would say that
 6 comes from SPLEND. So that's the measure of sort of
 7 random guessing.
 8 Q. As opposed to about 62 and-a-half percent who
 9 saw the box and said 'I recognize this. This is
 10 SPLEND.' Right?
 11 A. Right. So if we will have 12 percent and 62
 12 percent it would leave about 50 who say, 'Well, maybe
 13 that's SPLEND because it's yellow.'
 14 Q. Or it's yellow and it's got a cloud and
 15 graduated blue lettering; and it's got the swoosh; and
 16 you see where it belongs, the coffee cup where it
 17 belongs; and all the other elements of the SPLEND
 18 trade dress. Right?
 19 A. Well, where Dr. Mazis was testifying --
 20 Q. Yes or no. Can I have a yes or no, then you
 21 can say whatever you want.
 22 A. He said primarily it was color. That's all
 23 I'm referring to.
 24 Q. Okay. And your results agree with Dr.
 25 Mazis's; correct?

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1 A. Well, that people can say that SPLEND is
 2 yellow, yes.
 3 Q. You aren't here to testify -- are you, sir --
 4 that it would be anti-competitive or impossible for
 5 Merisant to compete with SPLEND unless it could use
 6 the exact same color scheme as SPLEND, are you?
 7 A. That's not my province.
 8 MR. ZALESIN: If I could have just a moment,
 9 Your Honor. I think that's about it.
 10 MR. LOCASCIO: No questions of this witness.
 11 THE COURT: Very well. The witness is
 12 excused.
 13 THE WITNESS: Thank you, Your Honor.
 14 MR. LOCASCIO: We have only one other witness,
 15 Your Honor, and he will be available whenever we
 16 continue.
 17 THE COURT: Are we going to continue on
 18 Tuesday?
 19 MR. LOCASCIO: I got a call from my mediator
 20 last night and this afternoon that despite one of the
 21 other side's witnesses parties not being to give us
 22 authority, we should go to the mediation.
 23 Good luck to us, I guess. I've been ordered
 24 to go to Dallas Monday. Whatever is convenient to the
 25 Court to have the hearing, we'll all be here. If

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1 A. In what respect?
 2 Q. Well, in the following respects, sir.
 3 When people are shown this box, the yellow
 4 SPLEND box with the name removed, the primary reason
 5 that causes them to associate this trade dress with
 6 SPLEND, is the yellow color. Correct?
 7 A. They don't associate that trade dress with
 8 only the SPLEND.
 9 Q. The primary thing that people mention when
 10 they are asked 'Why are you telling me SPLEND,' is the
 11 yellow color. Correct?
 12 A. In his survey to those questions, yes.
 13 Q. Likewise, in your survey when among the 25
 14 percent of consumers who would associate the new yellow
 15 SAME box with SPLEND, the primary reason they gave for
 16 that association was the color yellow. Correct?
 17 A. The primary reason was yellow for that as well
 18 as SUGAR TWIN.
 19 Q. So you saved me the trouble. The same for
 20 SUGAR TWIN; right?
 21 A. Right.
 22 Q. So all the surveys of all the experts agree
 23 that the dominant or prominent feature that causes
 24 consumers to associate no-calorie sweeteners with
 25 SPLEND is the color yellow; right?

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1 that's Tuesday, I can be here Tuesday. I need to
 2 check. I'm not sure if I can get back. After lunch
 3 for, sure. I'm not sure if I can be back from Dallas
 4 Monday night to be here for Tuesday morning. Tuesday
 5 afternoon I can be here and not sleep in the courtroom
 6 and be a little more presentable.
 7 MR. ZALESIN: Whatever time is fine for
 8 McNeil, Your Honor.
 9 THE COURT: Your next witness is a fact
 10 witness?
 11 MR. LOCASCIO: It's the corporate
 12 representative. It's just one witness. But he's, as
 13 you know or only fact witness. So the direct is not
 14 that brief.
 15 THE COURT: No, it's not going to be that
 16 brief, if you go by his counterpart, Ms. Sandler.
 17 MR. LOCASCIO: We'll try to be a little
 18 briefer than Ms. Sandler.
 19 THE COURT: Well, that's okay, because in any
 20 event I think it's safe to say that we can probably
 21 start at 2 p.m. on Tuesday. Okay? And then if it
 22 takes the whole afternoon, we can work on Wednesday day
 23 morning, because the courtrooms have to be closed by
 24 noon. So we would still have Wednesday morning. We
 25 could probably finish within Tuesday and then have your

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1 arguments Monday or whatever. Your arguments shouldn't
2 take more than one hour, I guess.

3 And then your mediation is going to take the
4 whole day, I guess, on Monday.

5 MR. LOCASCIO: Yes.

6 THE COURT: And then you would have to rush
7 back to Puerto Rico to be here early in the morning.
8 And I don't like that because I know what travelling
9 can do, especially coming from Texas, where I have been
10 quite a few times.

11 So, I don't know, I guess I identify myself
12 still with my travels as a practitioner before. So I
13 know how it is.

14 MR. LOCASCIO: I certainly appreciate that,
15 Your Honor.

16 THE COURT: Yes. So we'll start then on
17 Tuesday day at 2 p.m.

18 MR. LOCASCIO: Okay. Is the plan we will have
19 argument if we can get it in Tuesday as well?

20 THE COURT: Yes, if we can get it in safely
21 and without court employees crumbling down and
22 everything going on.

23 You will probably have enough time to
24 recuperate.

25 THE CLERK: I hope so.

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REPORTER'S CERTIFICATE

13 I, JOYCE DEL VALLE, Official Court
14 Reporter;

15 DO HEREBY CERTIFY that the foregoing
16 transcript is a full, true and correct record of the
17 testimony that was taken down by me by machine
18 shorthand and thereafter transcribed by means of
19 computer aided transcription method.

20 I FURTHER CERTIFY that I am in no way
21 interested in the outcome of the case mentioned in said
22 caption.

23 JOYCE DEL VALLE
24 Official Court Reporter
25

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1 THE COURT: Okay. So then we will recess
2 until Tuesday at 2 p.m. I wish you good luck in your
3 mediation.

4 (The taking of the hearing was
5 concluded.)
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